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IN THE

Supreme Court of the United States

October Term, 1962

No. 214

JOSEPH L. O'BRIEN CO.,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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May ., 1962

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OPINIONS BELOW

The opinion of the Court of Appeals was filed April 9, 1962, and it has not yet been reported. It is printed as Appendix A, hereto, *infra* p. 17.

The opinion of the Tax Court of the United States is reported in 35 T.C. 750, and is printed at pages 9a-17a of the Appendix which was printed by the petitioner for use in the court below, nine copies of which have been filed with this petition, in accordance with rule 23(i).

JURISDICTION

The judgment of the Court of Appeals was dated and entered on April 9, 1962, and the date of the filing of this petition is within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATUTE INVOLVED

Internal Revenue Code of 1954:

Sec. 61. Gross Income Defined

(a) *General Definition.* — Except as otherwise provided in this sub-title, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * * * * * * * * *

(7) Dividends

* * * * * * * * * *

(26 U.S.C. 1958 ed., Sec. 61)

Sec. 243. Dividends Received By Corporations

(a) *General Rule.*—In the case of a corporation, there shall be allowed as a deduction an amount equal to 85 percent of the amount received as dividends * * * from a domestic corporation which is subject to taxation under this chapter.

* * * * * * * * * *

(26 U.S.C. 1958 ed., Sec. 243)

Sec. 316. Dividend Defined

(a) *General Rule.*—For purposes of this sub-title, the term "dividend" means any distribution of property made by a corporation to its shareholders—

(1) out of its earnings and profits accumulated after February 28, 1913 * * *

* * * * * * * * * *

(26 U.S.C. 1958 ed., Sec. 316)

QUESTIONS PRESENTED

1.

When a contingent agreement of sale of corporate stock provides that in event of performance all dividends received by the seller between the date of the agreement and the date of performance shall become the property of the buyer, and shall be "paid over" to the buyer at the time of settlement, and when, after the receipt of such dividends by the seller, such contract is actually performed, in accordance with the terms thereof, are such dividends taxable income to the buyer or to the seller?

2.

More specifically, when in such case the parties are corporations which party is entitled to the benefit of a dividends-received income tax deduction under section 243(a) of the Internal Revenue Code of 1954?

STATEMENT OF THE CASE

Petitioner is a corporation chartered under the laws of Pennsylvania on December 22, 1954.

American Locomotive Company is a corporation hereinafter referred to as *American*.

General Steel Castings Corporation is a corporation hereinafter referred to as *General*.

Sutro Brothers & Co., is an association of stockbrokers hereinafter referred to as *Sutro*.

On December 7, 1954, *American* was the owner of 53000 shares of the capital stock of *General*, and *American* desired to sell this stock, and petitioner desired to buy it, at the price of $20. per share. At that time, however, it was not possible to complete a sale because it was believed that in order to do so it would be necessary for *American* either (1) to obtain a so-called "no-action" letter from the Securities Exchange Commission, or (2) to induce *General* to file a registration statement pursuant to the provisions of the Securities Act of 1933 (15 U.S.C. sec. 77a). Therefore, on December 7, 1954, petitioner,[1]

[1] Actually, petitioner was not formally incorporated until December 22, 1954 (R. 4a) but this is immaterial because respondent has admitted on the record that when *Sutro* signed this agreement it was acting "as agent for petitioner" (R. 5a) and therefore petitioner was admittedly at least a *de facto* corporation, with power to contract, when the agreement was signed. See 13 Am. Jur., Corporations, sec. 45 et seq.; and see also note 2, *infra*, p. 7.

(Citations to the Record ("R") refer to the printed Appendix used in the court below, nine copies of which have been filed with this petition.)

acting by and through *Sutro*, as agent, entered into a written agreement with *American* in which it was provided, in substance and effect, that petitioner would buy the stock if and when *American* succeeded in satisfying the statutory requirements, provided, however, that *American* be prepared to sell not later than April 15, 1955. A full copy of this agreement follows (R. 9a; emphasis added):

"AMERICAN LOCOMOTIVE COMPANY
30 Church Street, New York 8, N. Y.

"December 7, 1954

"Sutro Brothers
120 Broadway
New York, N. Y.

"Gentlemen:

"This will serve to confirm our understanding with you relative to your purchase of 53,000 shares of the outstanding common stock of General Steel Castings Corporation, of which we are now the owner.

"Subject to the provisions set forth below, we agree to sell such shares to you, and you agree to buy the same from us, at a purchase price of $20.00 per share, making an aggregate purchase price of $1,060,000. It is understood that no commissions will be payable by us in connection with this transaction, and by acceptance of this letter you agree to indemnify us for liability of any such commissions.

"As we have advised you, an opinion has been requested from the Securities Exchange Commission to the effect that the sale of these shares by us will not require the filing of a registration statement under the Securities Act of 1933, as amended. We hope

to obtain a so-called "no action" letter in this regard from the Securities Exchange Commission sometime next week. It is understood that upon our receipt of such a 'no action' letter on or before December 28, 1954, we shall deliver on not less than two, and not more than three, business days notice to you after such receipt a certificate or certificates for the shares referred to above, duly endorsed for transfer and with federal and state transfer stamps attached, to you and that you will pay us the purchase price therefor. If a 'no action' letter is not received on or before the date mentioned above, we will request General Castings Corporation to file an appropriate registration statement and to comply with the other requirements of the Securities Act of 1933 to the end that the purchase and sale of the above securities may be legally consummated. If such a registration statement is so filed and becomes effective within the time limit hereinafter set forth, we will deliver the certificate or certificates for the above-mentioned shares, duly endorsed for transfer and with federal and state transfer stamps attached, to you against receipt of the purchase price therefor on two business days notice to you but not later than three business days after the effective date of the registration statement.

"If a 'no action' letter is not received from the Securities Exchange Commission on or before December 28, 1954, and if a registration statement as aforesaid with respect to these securities fails to become effective on or before April 15, 1955, this agreement shall become ineffective and there shall be no further rights or liabilities on the parts of either of us because of the transaction covered hereby.

"If the transaction is consummated as herein provided, all dividends paid or payable on the said stock after the date hereof shall be your property and shall be paid over at the time of payment of the purchase price, but without liability for interest thereon.

"If it becomes necessary to file a registration statement in order to consummate the transaction, you will pay interest to us on the purchase price ($1,060,000) at the rate of 3% per annum from December 28, 1954 to the date of delivery. Such interest will be payable to us on such delivery date.

"If the foregoing meets with your approval kindly indicate your assent by signing the endorsement at the foot of this letter and returning the same to us, retaining the copy for your files.

"Very truly yours,
American Locomotive Company
By Herman Press
Treasurer

"Accepted:
December 7, 1954
"Sutro Brothers
By Charles A. Bezer"

On January 11, 1955, a "no action" letter was obtained by *American*, and the agreement was consummated shortly thereafter. That is to say, on January 18, 1955, *Sutro*, acting as agent for petitioner,[2] acquired the 53000

[2] Prior to this time, as stated in note 1, *supra*, petitioner had been formally incorporated, and it is a stipulated fact that "Sutro purchased these shares as agent for petitioner." (R. 5a); and the Tax Court so found (R. 13a). It is therefore completely immaterial that petitioner was not a *de jure* corporation, but only a